S E R V E D
October 23, 2013
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

DOCKET NO. 13-04

STREAK PRODUCTS, INC.

v.

UTi, UNITED STATES, INC.

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

I. THE PARTIES, THE COMPLAINT, AND THE MOTION TO DISMISS.[1]

Complainant Streak Products, Inc. (Streak) is a Delaware corporation that manufactures computer storage devices. Respondent UTi, United States, Inc. (UTi) is a non-vessel-operating common carrier (NVOCC) licensed by the Commission, License No. 001792. UTi has provided transportation services to Streak since at least 2003, transporting by water full container load (FCL) and less-than-container load (LCL) shipments between United States ports and foreign ports.

Due to concerns about the rates it was being charged for transportation services, Streak retained an expert to review freight invoices Streak paid to UTi during the period 2009 through 2011 and learned that on FCL shipments, UTi charged Streak rates in excess of the amounts set forth in UTi's tariff. Streak also learned that UTi did not have tariffs on file for LCL shipments. Streak claims that it only learned that UTi was charging rates other than that set forth in published UTi tariffs when it retained the expert. Streak contends that prior to the expert's review, it neither knew nor could have known that UTi was charging the allegedly excessive amount.

On April 12, 2013, Streak Products filed a Complaint with the Secretary alleging that UTi violated three sections of the Shipping Act of 1984: (1) 46 U.S.C. § 41104(2) by charging Streak

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[1] The following facts are derived primarily from the allegations in the Complaint, taken as true when considering a motion to dismiss. *Sinaltrainal v. Coca-Cola Company*, 578 F.3d 1252, 1260 (11th Cir. 2009).

rates greater than those stated in its published tariff; (2) 46 U.S.C. § 41104(4) by charging Streak rates greater than those it charged other shippers; and (3) 46 U.S.C. § 40501 by failing to keep open to public inspection in its tariff system tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and any through transportation route that has been established. Streak contends that it has suffered actual injury as a result of UTi's violations. On April 18, 2013, the Secretary served the Complaint and Notice of Filing of Complaint and Assignment on UTi.

On May 27, 2013, UTi filed a motion to dismiss in lieu of an answer. UTi concedes it violated the Act in the manner that Streak alleges. "Streak correctly alleges that UTi failed to comply with the tariff publishing requirements of the Shipping Act .... During the relevant period from 2009 to 2011, UTi had no published tariff rate in effect for any of the FCL or LCL shipment services it provided to Streak Products." (Respondent UTi, United States, Inc.'s Memorandum in Support of Motion to Dismiss the Verified Complaint of Streak Products, Inc. (UTi Memorandum) at 3.)

> Throughout the parties' course of dealing, Streak Products and UTi would mutually agree as to the proper rates for the various shipment services rendered by UTi without any reference to published tariffs. Until the filing of its Verified Complaint, Streak Products does not allege ever questioning or disputing any charge or rate associated with UTi's services during the companies' decade-long business relationship. In fact, Streak Products has paid in full for all transportation services provided by UTi.
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> After a recent top-to-bottom review of its FMC-regulated activities, UTi discovered that the rates it charged to various customers, including Streak Products, over the past five years were not properly published in a tariff or contained in a non-tariff option (e.g., an NVOCC service arrangement or negotiated rate arrangement). UTi also learned that during the same period it did not have a general tariff in place covering commodities and trade lanes in which it provided services. Upon making this discovery, UTi immediately met with FMC officials and submitted an Initial Voluntary Self-Disclosure to the FMC's Bureau of Enforcement ("BOE") on March 11, 2013. Subsequently, on May 3, 2013, UTi submitted a Perfected Voluntary Self-Disclosure detailing the extent of its violations, the reason for its violations, its compliance efforts, its corrective actions, and mitigating circumstances. On May 9, 2013, UTi met again with BOE officials to discuss a final resolution of the matter. As of this filing, UTi and BOE are in final negotiations to reach a compromise agreement whereby UTi will correct its tariff publishing practices and pay penalties for its violations as a final settlement of the matter.

(*Id.* at 3-4 (citations omitted).)

Despite the admitted violations of the Act, UTi argues that Streak's claim that UTi violated section 40501 must be dismissed for lack of standing because Streak does not and cannot allege any

actual injury resulting from the violation and UTi has already voluntarily self-disclosed its tariff publishing violation to the FMC. Therefore, UTi contends, the section 40501 claim is moot.

UTi argues that Streak's claims that UTi charged rates exceeding its tariff in violation of section 41104(2) must be dismissed for failure to state a claim. UTi contends that because it did not have a valid tariff in effect during the relevant period it transported cargo for Streak, Streak cannot establish an amount that UTi overcharged on the Streak shipments. Therefore, Streak cannot establish an amount it should be awarded in reparations. (*Id.* at 13-14.)

UTi argues that Streak's claim for discriminatory pricing in violation of section 41104(4) must be dismissed because Streak does not allege a factual basis to support its assertion that UTi charged Streak less favorable rates than other shippers. (*Id.* at 14-15.)

UTi argues that if the case goes forward, the Act's statute of limitations bars Streak's claims for a reparation award for violations accruing more than three years prior to the date Streak filed the Complaint. "Streak . . . filed its Verified Complaint on April 12, 2013, so its claims are barred and must be dismissed to the extent they seek reparations for Shipping Act violations that accrued before April 12, 2010." (*Id.* at 16.)

II. STATUTORY FRAMEWORK.

Streak filed its Complaint pursuant to section 11 of the Act.

> A person may file with the . . . Commission a sworn complaint alleging a violation of this part, except section 41307(b)(1). If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation.

46 U.S.C. § 41301(a).

The Complaint alleges that UTi is an NVOCC within the meaning of the Act. "The term 'non-vessel-operating common carrier' means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(16).

> The term "common carrier" – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of *passengers* or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(6) (emphasis added). The Act sets forth requirements and prohibitions on common carriers. The Complaint alleges that Respondents violated three sections of the Act.

> Section 40501 of the Act requires common carriers to publish a tariff.
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> Each common carrier . . . shall keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established. However, a common carrier is not required to state separately or otherwise reveal in tariffs the inland divisions of a through rate.

46 U.S.C. § 40501(a). Subparagraph (b) of section 40501 sets forth the information to be included in the tariff. "A tariff under subsection (a) shall be made available electronically to any person, without time, quantity, or other limitation, through appropriate access from remote locations. A reasonable fee may be charged for such access, except that no fee may be charged for access by a Federal agency." 46 U.S.C. § 40501(c).

> Section 41104 governs operations by common carriers.
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> A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not – . . . (2) provide service in the liner trade that is – (A) not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under chapter 405 of this title . . .; (4) for service pursuant to a tariff, engage in any unfair or unjustly discriminatory practice in the matter of – (A) rates or charges . . . .

46 U.S.C. § 41104.

The Complaint alleges that Streak was injured by UTi's alleged violations and seeks a reparation award for its injuries. The Act defines actual injury.

> (a) *Definition.* – In this section, the term "actual injury" includes the loss of interest at commercial rates compounded from the date of injury.
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> (b) *Basic amount.* – If the complaint was filed within the period specified in section 41301(a) of this title, the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.

46 U.S.C. § 41305.

III. THE COMMISSION RULES OF PRACTICE AND PROCEDURE PERMIT CONSIDERATION OF A MOTION TO DISMISS.

The Commission's Rules of Practice and Procedure (Rules), 46 C.F.R. Part 502, do not explicitly provide for a motion to dismiss for lack of subject matter jurisdiction or a motion to dismiss for failure to state a claim.

> Rule 12 of the Commission's Rules of Practice and Procedure (the Rules) states that the Federal Rules of Civil Procedure will be followed in instances that are not covered by the Commission's Rules, to the extent that application of the Federal Rules is consistent with sound administrative practice. 46 C.F.R. § 502.12. As the Commission's Rules do not address motions to dismiss for lack of subject matter jurisdiction or failure to state a claim, Federal Rules 12(b)(1) and 12(b)(6) apply in this case. *See, e.g., The Lake Charles Harbor and Terminal District v. West Cameron Port, Harbor and Terminal District*, 2007 WL 2468431 (F.M.C.).
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> > Rule 12(b)(1) permits a party to raise by motion lack of subject matter jurisdiction, and Rule 12(b)(6) permits a party to raise by motion failure to state a claim. With regard to motions to dismiss a complaint for lack of subject matter jurisdiction under Rule 12(b)(1), such motions may assert either a factual attack or a facial attack to jurisdiction. . . . A factual attack challenges "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." . . . In a facial attack, on the other hand, the court examines whether the complaint has sufficiently alleged subject matter jurisdiction. As it does when considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court construes the complaint in the light most favorable to the plaintiff and accepts all well-pled facts alleged . . . in the complaint as true.
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> *Sinaltrainal v. Coca-Cola Company*, 578 F.3d 1252, 1260 (11th Cir. 2009).

To survive motions to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, [556 U.S. 662, 677] (2009). The complaint must be sufficient to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); *see also* 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure Civ. § 1215 (3d ed. 2010) ("[T]he test of a

complaint's sufficiency simply is whether the document's allegations are detailed and informative enough to enable the defendant to respond.").

Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc., FMC No. 09-01, Order at 19-20 (FMC Aug. 1, 2011) (Order Denying Appeal, etc.).

The Commission has jurisdiction over allegations that "involve elements peculiar to the Shipping Act." *Cargo One, Inc. v. COSCO Container Lines Co., Ltd.*, 28 S.R.R. 1635, 1645 (FMC 2000). Allegations "involving unfair or unjustly discriminatory practices, undue or unreasonable preferences, undue or unreasonable prejudice or disadvantage, and just and reasonable regulations and practices, are inherently related to Shipping Act prohibitions and are therefore appropriately brought before the Commission." *Id.*

IV. THE COMMISSION HAS SUBJECT MATTER JURISDICTION OVER STREAK'S SECTION 40501 CLAIM.

A. Argument.

UTi contends that Streak's claim that UTi violated section 40501 must be dismissed pursuant to F.R.C.P 12(b)(1) for lack of standing because:

> (1) Streak Products does not and cannot allege any actual injury resulting from the violation, as required to maintain a claim for reparations and attorneys' fees; and
>
> (2) UTi has already voluntarily self-disclosed its tariff publishing violation to the FMC and is very close to resolving the matter by final compromise agreement with the Commission, thereby rendering Streak Products' cause of action moot.

(UTi Memorandum at 8.) UTi did not submit a final compromise agreement with its motion.

Streak responds that any "person" may file a complaint alleging a violation the Shipping Act. "If Congress had intended that only the Commission could file an action to obtain . . . relief [for violations of section 40501], it would have so provided." (Streak Products, Inc.'s Opposition to Respondent's Motion to Dismiss (Streak Opp.) at 16-17.)

B. Discussion.

"A person may file with the . . . Commission a sworn complaint alleging a violation of [the Shipping Act]." 46 U.S.C. § 41301(a). Streak is a person within the meaning of the Act. 1 U.S.C. § 1. The Complaint alleges that UTi is a common carrier within the meaning of the Act and that it violated section 40501 by failing to keep open a tariff. UTi, a common carrier, concedes that it did not keep open a tariff. (*See* UTi Memorandum at 3 ("UTi discovered that the rates it charged to

various customers, including Streak Products, over the past five years were not properly published in a tariff or contained in a non-tariff option").

While the Act *permits* a complainant to seek a reparation award for actual injury caused by a violation, neither the Act nor the Commission's regulations *requires* an allegation of damages to state a claim that a respondent has violated the Act. The Commission has subject matter jurisdiction over Streak's claim that UTi violated section 40501 by failing to keep open a tariff. Therefore, the motion to dismiss the section 40501 claim is denied.

V. STREAK'S COMPLAINT STATES A CLAIM OF VIOLATION OF SECTION 41104(2).

A. Argument.

UTi contends that Streak's claims that UTi charged rates exceeding its tariff in violation of section 41104(2) must be dismissed for failure to state a claim "because UTi admits, and the Commission has determined, that UTi had no valid tariff in effect during the relevant period for any of the FCL or LCL shipment services it rendered to Streak Products." (UTi Memorandum at 12.) "Streak Products should . . . be prohibited from collecting overcharges from a common carrier like UTi based on an invalid, inapplicable, or nonexistent tariff." (*Id.* at 13-14.)

> At bottom, UTi admittedly failed to maintain a valid tariff for the ocean transportation[] services it rendered to Streak Products from 2009 to 2011. Because no tariff rate applied to the parties' transactions, Streak Products cannot establish an overcharge (i.e., the delta between the service rate charged and the applicable tariff rate). As a result, Streak Products is not entitled to seek reparations for the FCL or LCL shipment services it received under 46 U.S.C. § 41104(2) or 46 U.S.C. § 41104(4).

(*Id.* at 14.)

Streak responds that although "there were technical errors in UTi's [FCL] tariff rates, UTi did publish tariff rates for these specific shipments. Thus, the appropriate measure of reparations to which Streak is entitled is the difference between UTi's published rates versus the rates Streak was charged." (Streak Response at 2. *See* Complaint ¶ IV.D.)

B. Discussion.

The Complaint alleges that UTi published tariff rates for FCL shipments. UTi contends that it did not publish tariff rates for FCL shipments. This dispute of fact precludes dismissal for failure to state a claim on the FCL shipments. UTi seems to accept that when a common carrier publishes a tariff, then charges an amount greater than that published tariff, a shipper may recover as damages the difference between the published tariff and the rate charged. UTi contends that if the common

carrier completely fails to comply with the Act and does not publish a tariff at all (as the parties agree UTi failed to do for LCL shipments), a shipper may not receive a reparation award because there is no measure of damages – no "delta between the service rate charged and the applicable tariff rate." (UTi Memorandum at 14.) UTi's argument is not persuasive. UTi's motion to dismiss the claim of violation of section 41104(2) is denied.

VI. STREAK'S COMPLAINT STATES A CLAIM OF VIOLATION OF SECTION 41104(4).

A. Argument.

UTi relies on *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* (*see Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, FMC No. 09-01, quoted at page 5 above) to support its argument that the Complaint fails to allege specific facts sufficient to state the claim that UTi violated section 41104(4). UTi contends that Streak's

> claim for discriminatory pricing under 46 U.S.C. § 41104(4) must also be dismissed because Streak Products alleges no factual basis whatsoever to support its naked assertion that UTi has charged Streak Products less favorable rates than other shippers. The only allegation supporting Streak Products' claim is found in the very last paragraph of its "Statement of Facts," where Streak Products alleges that UTi has "engaged in an unfair or unjustly discriminatory practice by charging Streak rates greater than those it charged other shippers." This allegation simply mirrors the verbatim language of the Shipping Act provision that creates the private right of action Streak Products is attempting to assert. The Verified Complaint does not allege a single instance in which UTi has charged another shipper a more favorable rate than the rates it charged Streak Products during the relevant period. Nor does the Verified Complaint allege the rates Streak Products was charged by UTi for its services or the rates that Streak Products supposedly should have been charged. Simply put, this claim is a textbook example of a "formulaic recitation of the elements of [the] cause of action," which the Supreme Court made clear is not sufficient to state a plausible cause of action under Rule 12(b)(6).

(*Id.* at 14-15.)

Streak argues that its Complaint alleges sufficient factual grounds to satisfy the *Bell Atlantic/Iqbal* standard.

> Streak has alleged, and now UTi admits, that UTi billed it rates that were not set forth in its published tariff. That alone states a claim under binding Commission precedent. Further, Streak alleges that in charging it rates that are higher than those in UTi's published tariff, UTi charged it rates higher than what it charged other shippers. That certainly provides sufficient information to enable the defendant to

> respond and states a plausible claim on its face. Of course it is not until UTi responds to discovery that Streak will know exactly how much UTi actually charged similarly situated shippers, but UTi's published tariffs reflect that its tariff rates for similarly situated shipments were much lower than the amounts it billed Streak.

(Streak Response at 17-18.)

In its Reply, UTi reprises its *Bell Atlantic/Iqbal* argument. (UTi Reply at 12-13.)

B. Discussion.

The Complaint alleges that "UTi issued invoices to Streak for FCL shipments in excess of the amounts set forth in UTi's tariff," (Complaint ¶ IV.D), that "UTi has overcharged [Streak] by billing amounts in excess of [UTi's] lawful tariff from 2003 until the present," (*id.* ¶ IV.G), and that UTi "charg[ed] Streak rates greater that those it charged other shippers." (*Id.* ¶ IV.J.) These factual allegations, which must be taken as true when considering a motion to dismiss for failure to state a claim, "are detailed and informative enough to enable [UTi] to respond" to the allegation that UTi violated section 41104(4) by charging Streak rates greater than those it charged other shippers. UTi's motion to dismiss the claim of violation of section 41104(4) is denied.

VII. THE MOTION TO DISMISS ON STATUTE OF LIMITATIONS GROUNDS IS DENIED.

A. Argument.

UTi contends that if the case goes forward, the Act's statute of limitations bars Streak's claims for a reparation award for violations accruing more that three years prior to the date Streak filed the Complaint. "Streak . . . filed its Verified Complaint on April 12, 2013, so its claims are barred and must be dismissed to the extent they seek reparations for Shipping Act violations that accrued before April 12, 2010." (*Id.* at 16.) In its response, Streak refers to the allegations in its Complaint that "Streak believes that UTi has overcharged it by billing amounts in excess of its lawful tariff from 2003 until the present" (Complaint ¶ IV.G) and "[p]rior to December of 2012, Streak neither knew, nor could have known, that UTi was charging it for amounts in excess of UTi's published tariff." (*Id.* ¶ IV.I.) Streak relies on the Commissions adoption of

> the discovery rule, holding that a complainant's cause of action accrues when it knew or should have known that it had a case against the respondent. In adopting the discovery rule, the Commission recognized that there are "compelling reasons suggesting that a flexible approach to the accrual of a cause of action is the better course of action."

(*Id.* at 18, *quoting Inlet Fish Producers Inc. v. Sea-Land Service, Inc.*, 29 S.R.R. 306, 313 (FMC 2001).) Relying on this rule, Streak argues that the well-pleaded facts of the Complaint, which must be taken as true when considering a motion to dismiss, state that Streak did not know or have reason

to believe it had a claim until it received the expert's report. Therefore, the statute of limitations does not bar its Complaint.

Streak also contends that on December 20, 2012, UTi and Streak signed the first of a series of agreements tolling the statute of limitations on freight charges for which UTi has billed Streak. The agreements state:

> 2. This Tolling Agreement shall bind UTi and Streak and their parents, subsidiaries, affiliates, successors and assigns.
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> 3. In order to facilitate efforts by the parties to explore negotiations and possible settlement of claims related to the aforementioned freight charges, UTi and Streak agree to toll the running of time under any applicable statute of limitations, laches of other defense of similar import of any claims the parties may have against each other. For purposes of calculating time periods under a statute of limitations, laches or any other defense of similar import, the tolling period shall be disregarded.
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> 4. This Agreement shall not act to extend any claims which have already become time-barred as of the date of the execution of this Agreement.

(Streak Opp. Exhibit 1.) The last of the three agreements, signed by UTi's counsel in this proceeding as counsel for UTi,[2] expired April 12, 2013, the date on which Streak filed its Complaint. Therefore, Streak contends that if applicable, the statute of limitations only bars claims accruing more than three years before December 20, 2012.

In its reply, UTi argues that the discovery rule only applies when "the injury is not of the sort that can readily be discovered when it occurs." (UTi Reply at 14, *quoting Maher Terminals, LLC v. Port Authority of New York and New Jersey*, Decision at 13, FMC No. 08-03 (ALJ May 16, 2011) (Initial Decision Granting in Part Motion for Summary Judgment and Dismissing Claim for a Reparation Award Based on Lease-Term Discrimination Claims). "Here, Streak Products' alleged injuries are clearly of the sort that could readily be discovered at the time of their occurrence." (*Id.*) Regarding the tolling agreements, UTi states:

> As an initial matter, Streak Products' Verified Complaint does not allege the existence of a tolling agreement dating back to December 2012, and any effort by Streak Products to amend its complaint through motions briefing is prohibited. *See, e.g., Arbitraje Casa de Cambio, S.A. v. U.S. Postal Serv.*, 297 F. Supp. 2d 165, 170 (D.D.C. 2003) ("It is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss"); *Donnelly v. Option One Mortg. Corp.*,

[2] The first two agreements were signed by George Hassapis, Asst. General Counsel for UTi.

No. 11-cv-7019 (ES), 2012 WL 4490642, at *4 n.3 (D.N.J. Sept. 26, 2012). Streak Products may seek leave to amend if it wishes to do so.

(UTi Reply at 14 n.13.)

B. Discussion.

A claim that an action or portion of an action is barred by the statute of limitations is an affirmative defense. *See* Fed. R. Civ. P. 8(c)(1), made applicable to this proceeding by 46 C.F.R. § 502.12. A party asserting an affirmative defense must establish all of the essential elements of the defense to warrant judgment in its favor. *E.E.O.C. v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 54-55 (1st Cir. 2002); *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1264 (11th Cir. 2001).

Some federal circuits permit consideration of a motion to dismiss on statute of limitations grounds.

> Technically, the Federal Rules of Civil Procedure require that affirmative defenses be pleaded in the answer. Rule 12(b) states that "[e]very defense . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion. . . ." The defenses listed in Rule 12(b) do not include limitations defenses. Thus, a limitations defense must be raised in the answer, since Rule 12(b) does not permit it to be raised by motion. However, the law of this Circuit (the so-called "Third Circuit Rule") permits a limitations defense to be raised by a motion under Rule 12(b)(6), but only if "the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations." *Hanna v. U.S. Veterans' Admin. Hosp.*, 514 F.2d 1092, 1094 (3d Cir. 1975). "If the bar is not apparent on the face of the complaint, then it may not afford the basis for a dismissal of the complaint under Rule 12(b)(6)." *Bethel v. Jendoco Constr. Corp.*, 570 F.2d 1168, 1174 (3d Cir. 1978).

Robinson v. Johnson, 313 F.3d 128, 135 (3d Cir. 2002) (footnote omitted).

If the Third Circuit Rule is applied here, it is not apparent on the face of Streak's Complaint that its claims are barred. Streak alleges that it did not discover that it had a case against UTi until it received its expert's report; that is, it "neither knew, nor could have known, that UTi was charging it for amounts in excess of UTi's published tariff." UTi contends that "alleged injuries are clearly of the sort that could readily be discovered at the time of their occurrence." The competing allegations raise a factual dispute on this issue that cannot be resolved on a motion to dismiss for failure to state a claim. Streak does state that "UTi published its tariffs through Trade Tech during the relevant time period. Thus, a shipper wishing to determine what tariffs and tariff rates UTi had published could, for a fee, go to the Trade Tech website, enter the name UTi and select the relevant tariff from the database," (Streak Opp. at 11 (citation omitted)). Although this statement seems

inconsistent with Streak's claim that it could not have known UTi was charging rates in excess of the published tariff until it received the expert's report, based on the allegations of the Complaint, a factual dispute remains on whether the statute of limitations bars any of Streak's claims. *See also Fry Trucking Co. v. Shenandoah Quarry, Inc.*, 628 F.2d 1360, 1363 (D.C. Cir. 1980) ("the shipper is charged with constructive notice of the actually filed rate") (*citing Nyad Motor Freight v. W.T. Grant Co.*, 486 F.2d 1112 (2d Cir. 1973); *Louisville & N. R.R. v. Maxwell*, 237 U.S. 94, 97 (1915); and *Bowser & Campbell v. Knox Glass, Inc.*, 390 F.2d 193, 196 (3d Cir. 1968).

Putting aside my surprise that an attorney who signed an agreement tolling the statute of limitations would then suggest that the tolling agreement does not apply, UTi's contention that Streak should be required to file a motion to amend its Complaint to assert the tolling agreement (UTi Reply at 14 n.13) misapprehends the procedure for asserting an affirmative defense. Streak's Complaint does not and need not allege anything about the statute of limitations or that UTi signed a tolling agreement. If UTi does not plead the affirmative defense of statute of limitations in its answer, the defense may be waived and there is no time bar to Streak's claims. If UTi does plead the statute of limitations defense, the burden is on UTi to establish its applicability and the date on which the statute cuts off Streak's claims. Assuming the statute of limitations bars some of Streak's claims and assuming UTi and its counsel signed the tolling agreements described above, it seems UTi would be hard-pressed to establish that claims accruing on or after December 20, 2009 (three years before Streak and UTi signed the first tolling agreement) are barred by the statute of limitations. *See Hunter-Boykin v. George Washington Univ.*, 132 F.3d 77, 82-84 (D.C. Cir. 1998) (construing tolling agreement).

The motion to dismiss on statute of limitations grounds is denied.

ORDER

Upon consideration of Respondent UTi, United States, Inc.'s Motion to Dismiss the Verified Complaint of Streak Products, Inc., the opposition thereto, UTi's reply, and the record herein, and for the reasons stated above, it is hereby

ORDERED that the Motion to Dismiss be **DENIED**. It is

FURTHER ORDERED that on or before ten days from the date of this Order, UTi, United States, Inc., serve and file its answer to the Complaint. 46 C.F.R. § 502.62(b).

The parties are reminded of their obligations set forth in the Initial Order. *Streak Products, Inc. v. UTi, United States, Inc.*, FMC No. 13-04 (ALJ Apr. 22, 2013) (Initial Order).

Clay G. Guthridge
Administrative Law Judge